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TEMPLE HONOURS—"NO DUTY NO HONOUR".

The right of entry and of worship in a temple is a civil right. In the exercise of that right, particular persons and groups, particular sects and castes, claim various honours and privileges.

One claim of that sort is by the members of a caste as such, to be served the sacred ashes before they are served to the other castes. During recent years, this claim has come into unpleasant prominence by reason of the rivalry between the champions of Vedic hymns and the champions of Tamil hymns. The Brahman worshippers contend that as per long usage they are to receive the sacred ashes as soon as the Vedic chant is over, and before the Tevaram is commenced to be sung; on the other hand, the champions of Tevaram contend that as per Saiva canon and undefiled usage, the sacred ashes are to be distributed only after the Tevaram chant also is over.

Is the question at issue between the rival castes cognizable by the Civil Court? The claim relates to a point of religious etiquette which consists in receiving temple-prasadam in a certain order of precedence; and no question of right to property or to an office is involved. Therefore, the claim is *prima facie* not one of a civil nature (*Vathiar Venkatachariar* v. *Ponnappa Aiyangar*,[1] *Karuppa Goundan* v. *Kolanthayan*,[2] *Subbaraya Mudaliar* v. *Vedantachariar*[3] and *Striman Sadagopa* v. *Kristna Tatachariyar*[4]).

But two broad and brave grounds are urged (by the resources of advocacy) for maintaining that the claim is of a

1. (1918) 7 L.W. 614 at 617.
2. (1883) I.L.R. 7 M. 91
3. (1904) I.L.R. 28 M. 23 at 25: 14 M.L.J. 171.
4. (1863) 1 M. H.C.R. 301 at 307.

civil nature. One ground is that every privilege or honour claimed by a caste is *per se* a claim of civil nature; the other ground is that the precedence in question is incidental to the civil right of worship.

No positive authority could be adduced in support of the first ground, that any and every privilege, precedence, dignity, or honour, claimed by a caste, that is, by persons as members of, or on behalf of, the caste is *per se* and intrinsically a claim of civil right. The proposition is based solely on the implication of a casual passage in *Karuppa Goundan* v. *Kolanthayan*[2] and another casual passage in *Nagiah Bathudu* v. *Muthacharry*.[5]

In *Karuppa Goundan* v. *Kolanthayan*[2] the suit was by a Vellala against certain other Vellalas to establish his right to receive certain offerings or honours before others of the same caste in seven Devastanams, and for an injunction to restrain the defendants from preventing his so receiving them. At page 92 of the judgment the following passage occurs:—

"If this had been a suit for an office, or to establish a right to which the plaintiff was entitled as a citizen, and as a member of the caste to which he belongs, he would, according to the decided cases, have had a right of suit . . . that which the plaintiff seeks is the honour and dignity, which, he says, has been enjoyed by him in succession to his ancestors, of receiving such offerings in the temples in question, and of receiving them before they are offered to any other members of the caste It is really a question of precedence on the occasions on which such offerings are received by the caste The commercial value of the offerings would be the same, if the plaintiff received them after other members of the caste; but he claims the honour of being the first to receive them. It is not a suit for an office or for a money value, but for an honour."

On the above view the High Court confirmed the judgment of the Courts below dismissing the suit on the ground that it was not of a civil nature.

The first sentence in the above extract is interpreted as meaning that that suit would be of a civil nature if only the plaint in the case had claimed that plaintiff was suing as a citizen and as a member of the caste to which he belonged. None of the decided cases generally referred to in that sentence of the judgment supports the above interpretation; apparently they are *Krishnama* v. *Krishnasami*[6] approving *Narasima Charlar* v. *Sri Kristna Tata Chariar*,[7] *Kamalam* v. *Sadagopa Sami*,[8] *Krishnasami*

2 (1883) I.L.R. 7 M. 91 at 92.
5. (1900) 11 M.L.J. 215 at 224.
6. (1879) I.L.R. 2 M. 62: 6 I.A. 120 (P.C).
7. (1871) 6 M. H.C.R. 449.
8. (1878) I.L.R. 1 M. 356.

Tatacharyar v. *Krishnamacharyar*[9] and *Vengamuthu* v. *Pandavesvara Gurukkal.*[10] Of those cases, the last relates to the right of worship of a "citizen and a caste Hindu" *i.e.*, a member of a section of the public, and the other four cases relate to temple offices. The expression "as a citizen, and as a member of the caste" was probably suggested by the language used in *Vengamuthu* v. *Pandavesvara Gurukkal*[10]; it is echoed in *Venkatachalapati* v. *Subbarayadu*[11] and *Gopala Muppanar* v. *Subramania Aiyar.*[12] What was claimed and allowed in *Vengamuthu* v. *Pandavesvara Gurukkal*[10] was a caste Hindu's right of public worship at a mantapam and not a special and exclusive right (see *Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13]).

The Privy Council case in *Mansur Hasan* v. *Muhammad Zaman*[14] is an instance of a suit brought by plaintiffs as citizens (*i.e.*, as members of the public or the State) to establish their right to conduct a religious procession with its appropriate observances through a public street; all members of the public have equal right in a public street. (*Sadagopa Chariar* v. *Krishnamoorthy Rao*[15]). The Privy Council case in *Sankaralinga Nadan* v. *Rajeswara Dorai,*[16] the Privy Council case in *Saklat* v. *Bella*[17] and *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya*[18] commented upon by the Privy Council in the Rangoon case, are instances of suits brought by persons *as members of a caste* to exclude outsiders from temples or shrines; and the cases in *Venkatachalapati* v. *Subbarayadu*[11] and *Gopala Muppanar* v. *Subramania Aiyar*[12] are converse cases of suits brought by excluded persons to vindicate their claim to enter temples or shrines in the exercise of their rights *as members of the caste to which they belonged.* Not the slightest doubt was ever raised as to these suits being suits of a civil nature; that was because, the right of entry and of worship has all along been recognized to be a civil right.

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9. (1882) I.L.R. 5 M. 313 at 314.
10. (1882) I.L.R. 6 M 151 at 153.
11. (1890) I.L.R. 13 M. 293 at 297.
12 (1914) 27 M.L.J. 253 at 262
13. (1916) 31 M.L.J. 758 at 763, 768.
14 (1924) I.L.R. 47 A. 151 · 52 I.A. 61: 48 M.L.J. 23 (P.C).
15 (1907) I.L.R. 30 M. 190: 17 M.L.J. 240 (P.C.).
16. (1908) I.L.R. 31 M. 236: 35 I A. 176: 18 M.L.J. 387 (P.C.).
17. (1925) I.L.R. 3 R. 582: 53 I.A. 42: 49 M.L.J. 821 (P.C).
18. (1883) I.L.R. 7 B. 323.

Anandrav Bhikajiphadke v. *Shankar Daji Charya*[18] is referred to and distinguished in *Nagiah Bathudu* v. *Muthacharry*.[5] The judgment which prevailed in *Nagiah Bathudu* v. *Muthacharry*[5] was that the claim by a worshipper to have the procession of an idol carried along his street is not one cognizable by a civil court. At pages 223 and 224 the following passage occurs:—

"The Bombay High Court has held in *Anandrav Bhikajiphadke* v *Shankar Daji Charya* [(1883) 7 B. 323] that a suit by certain members of a particular caste in which the plaintiffs claimed that the members of their caste, in common with certain other castes, possessed the *exclusive right of entry and worship in the sanctuary* of a temple was within the cognizance of the Civil Courts. The right set up in this case was the exclusive *right of certain castes to worship in the sanctuary of a temple. No question of ritual was involved* The usage upon which the Court adjudicated was an alleged caste usage. In the present case the right set up was not based upon caste usage, and was not relied upon as a caste privilege. It was a right set up by certain individuals which they claimed to enjoy not as members of the caste but as residents in a particular street."

The above passage is too slender and dubious a foundation for the argument that a claim in respect of any and every caste privilege is a claim of civil nature.

The decisions have refused to recognize ceremonial privileges claimed by sects or groups or their leaders in the exercise of the right of worship (*Karuppa Goundan* v. *Kolanthayan*,[2] *Babu Pujari* v. *Thilkra Gurikara*,[19] *Subbaraya Mudaliar* v. *Vedantachariar*[3], *Vathiar Venkatachariar* v. *Ponnappa Aiyangar*[1] and *Narayan Vithe Parab* v. *Krishnaji Sadashiv*[20]). If, as held in *Karuppa Goundan* v. *Kolanthayan*,[2] a person cannot claim to enforce his precedence over other members of his own caste, by parity of reasoning, one caste of the Hindu community cannot claim to enforce its precedence over another caste.

So early as 1863, the Civil Courts were enjoined "to guard carefully against entertaining suits in respect of mere ritual observances and the conduct of the various kinds of religious worship and ceremonies, and of what as incident thereto, may be due to the sacred character or the religious rank and position of individuals." "The duty of individuals to submit to and perform certain religious observances in accordance with the ritual

1. (1918) 7 L.W. 614 at 617.
2. (1883) I.L.R. 7 M. 91.
3. (1904) I.L.R. 28 M. 23 (25): 14 M.L.J. 171.
5. (1900) 11 M.L.J. 215 at 223, 224.
18. (1883) I.L.R. 7 B 323.
19. (1921) M.W.N. 395.
20. (1885) I.L.R. 10 B. 233.

or conventional practice of their race or sect is, *in the absence of express legal recognition and provision*, an imperfect obligation of a moral and not of a civil nature." (*Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13] quoting *Strimath Sadagopa* v. *Kristna Tatachariyar*[4]).

The cases in *Srinivasa Thathachariar* v. *Srinivasa Aiyangar*[21] and *Athan Sadagopa Chariar Swamigal* v. *Elayavalli Srinivasa Chariar*[22] draw attention (1) to "the growing tendency to bring before civil courts disputes on matters of religion not properly within their province" and (2) to "the legal ingenuity that is continually being exercised in trying to evade the provision in section 9, Civil Procedure Code, by trying to bring sectarian disputes under the wording of the explanation to that section."

Next, as to the second ground that the precedence in question is incidental to the civil right of worship. The argument is put in this way: The claim to the precedence in question is attached and incidental to the right of worship; and as the right of worship is recognized to be a civil right, the claim to the honours attached and incidental thereto is a claim of civil nature cognizable by the Civil Court. The argument is founded on certain general expressions in the judgment of Mr. Justice Krishnan in *Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar.*[13]

The actual decision in the case was this. The right of a person exclusively to conduct a Mantapapadi in a temple, bearing all the expenses of the ceremony, and *receiving in return* certain honours and emoluments is a civil right. A suit to establish such right is maintainable in the Civil Courts; as also a suit to enforce the claim for the honours and perquisites appurtenant to the right. (*Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13]). The case in *Kadirvelu Chetty* v. *Nanjundaiyar*[23] is on all fours with *Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13]; it was decided about six months earlier.

Here it may be observed, that the right to perform a Mantapapadi and to receive the honours and emoluments attached thereto, is recognized to be a species of property susceptible of

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4. (1863) 1 M. H.C.R. 301 at 308.
13. (1916) 31 M.L.J. 758 at 761, 762 to 768.
21. (1899) 9 M.L.J. 359
22 (1913) M.W.N. 300.
23. (1916) 3 L.W. 512.

partition among Hindu co-parceners. (*Nagiah Bathudu* v. *Muthacharry*[5] citing *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry*.[24]) In *Thirumalai Alwar Aiyangar v. Lakshmi Sadagopa Aiyangar*[13] that aspect is specifically mentioned in the judgment of Mr. Justice Spencer at page 763; so the claim in question in that case was a claim to property within the meaning of the explanation to section 9, Civil Procedure Code. It may be further observed that Mr. Justice Spencer was inclined to the view that the duty of the Mantapamdar to perform the Mantapapadi was a legal and not merely a moral duty (page 763).

Now as to the judgment of Mr. Justice Krishnan in that case, the learned Judge has used general language which puts on the same footing the case of honours appurtenant to an office and the case of honours appurtenant to a right of worship. A suit to enforce a person's right to an act of worship and to the honours "legally attached" thereto, is said to be a suit of a civil nature, quite as much as a suit to enforce a person's right to an office in a temple and to the honours "legally attached thereto" (page 766).

Says the learned Judge:

"The existence of the office to which the emoluments claimed are said to attach must be proved; and so must the connection between the office and the honours and dignities and perquisites claimed, be established by clear evidence. The right to an act of worship stands on the same footing as a right to an office; a person is entitled to enforce it by suit in the same way; and if any honours or perquisites are attached thereto, it follows that they can also be claimed *under the same conditions as honours attached to religious offices*" (page 767).

The honours in question in *Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13] were really appurtenant, and legally attached, to the special and exclusive right of worship claimed by the plaintiff They were due to him *in return and as remuneration for* his services. (31 M.L.J., 762, 763, 765, 767 and 768).

In respect of temple-honours claimed by virtue of an office, the case in *Sri Rungachariar* v. *Rungasami Battachar*[25] lays down that

"Civil Courts have jurisdiction to entertain a suit for honours, if they are claimed as attached inseparably to an office as *part of its emoluments*, and not simply accorded to its holder as marks of respect"

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5. (1900) 11 M.L.J. 215 at 222.
13. (1916) 31 M.L.J. 758.
24. (1874) 14 Beng. L.R. 166
25. (1908) I.L.R. 32 M. 291.

In that case the finding was that the privilege of the first "Theertham" was attached to the hereditary office of the plaintiffs (Sthaladars) *as a part of the remuneration of the office*. The office there in question involved secular and religious duties of different kinds, all inseparable from the office, and remunerated in various ways, one of which was by the honour then question. (*Sri Rungachariar* v. *Rungasami Battachar*[25]).

The test propounded by *Sri Rungachariar* v. *Rungasami Battachar*[25] was reiterated in *Atham Sadagopa Chariar Swamigal* v. *Elayavalli Srinivasa Chariar*[22]; and it is in perfect consonance with the enunciation of the law in the leading case in *Striman Sadagopa* v. *Kristna Tatachariyar*.[4] In that early case, the head of the Ahobala mutt claimed certain conventional dignities and honours in connection with the worship and ceremonials at the Varadarajaswami temple in Conjeeveram. Though a worshipper of high religious rank and sacred position, he held no office in the temple, and was under no legal duty to do any secular or religious service to the temple. The ground of decision is thus stated by Scotland, C. J.:

> "The honours and emoluments in question cannot in any respect be considered as remuneration for duties or ministrations performed by the plaintiff in the secular affairs or religious services of the pagoda. They are matters purely of ceremonial observance and devotional display, and are connected with a priestly office, which, as regards the dharmakarthas and worshippers at the pagoda has attached to it no other claim of right than that which rests upon the religious feelings which they, in common, with other Hindu worshippers, entertain for the sacred position of the plaintiff. Being, then, of opinion that the subject-matter of the present suit is purely religious, and relates to the sacred office of the plaintiff, and has no connection with any rights that can properly be considered as being of a civil nature, I think this suit is not cognizable by the Civil Courts."

No honours can be properly said to be "incidental to", or "attached to", or "connected with", an office or a right of worship, unless the honours are by way of return or remuneration for some legal duty of the office-holder or the worshipper. (See *Chunnu Datt Vyas* v. *Babu Nandan*,[26] *Rama* v. *Shivram*[27] citing *Sri Sunkur Bharti Swami* v. *Sidha Lingayah Charanti*,[28] *Narayan*

4. (1863) 1 M.H.C.R. 301 at 307.
22. (1913) M.W.N. 300 at 303.
25. (1908) I.L.R. 32 M. 291 at 297, 298.
26. (1910) I.L.R. 32 A. 527 at 538, 539.
27. (1882) I.L.R. 6 B. 116 at 121.
28. (1843) 3 M.I.A. 198.

Vithe Parab v. *Krishnaji Sadashiv*[20] citing *Ram* v. *Shivram*.[27]) *In short, the legal principle is No duty no honour.*

The judgment of Mr. Justice Krishnan in *Vathiar Venkatachariar* v. *Ponnappa Aiyangar*[1] was about one and a half years subsequent to his judgment in *Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13]; it re-affirms the view of the law taken in *Striman Sadagopa* v. *Kristna Tatachariyar*[4] and *Sri Rungachariar* v. *Rungasami Battachar*.[25]

The case in *Vathiar Venkatachariar* v. *Ponnappa Aiyangar*[1] related to a suit brought by certain persons known as "Theerthakars" of a temple in the Tinnevelly District. Unlike the Theerthakars in *Sri Rungachariar* v. *Rungasami Battachar*[25] and *Soma Ballachariar* v. *Thiruvenkatachariar*[29] they held no office, and were under no legal duty to the temple. "The evidence in the case established that they have special places allotted to them in the temple to stand and recite, and they are given the honour of Theertham and prasadam before the outsiders get them; and they have what is called an 'Arulapad,' that is, their names are called out by the Archaka in a certain order, when, if present, they have to respond by saying 'Nayinde,' meaning 'I am here'." On that evidence the learned Judge inclined to the view that the plaintiffs were "a recognized and privileged class of worshippers who were shown special consideration by having places allotted to them in the temple, and by being given the honours before the ordinary worshippers in an order of precedence fixed by the usage of the temple."

Yet the claim made by them to exclude from their group a person, who, according to them, had no right to be there, was held to be not triable by the Civil Court. It did not occur to the Bench or to the Bar to suggest that the right of worship was a peg on which the claim to precedence might be hung. Similarly in *Subbaraya Mudaliar* v. *Vedantachariar*[3] the Vadagalai communnity, on whose behalf the suit was brought to establish their claim to recite certain sacred texts in a temple, had an undisputed general right to worship in the temple; but they held no

1. (1918) 7 L.W. 614 (617).
3. (1904) I.L.R. 28 M. 23: 14 M.L.J. 171.
4. (1863) 1 M.H.C.R. 301.
13. (1916) 31 M.L.J. 758.
20. (1885) I.L.R. 10 B. 233 at 237.
25. (1908) I.L.R. 32 M. 291.
27. (1882) I.L.R. 6 B. 116.
29. (1912) 15 I.C. 409.

particular office in the temple, and the decision was that their claim was outside the province of the Civil Court.

The precedence now in question, if it was accorded to the Brahman community, was due merely to their position in the religious hierarchy (cf. *Sriman Sadagopa* v. *Kristna Tatachariyar*[4]). It was *not* accorded to them in return for any duty or service due and rendered by them to the temple.

The right of worship belonging to the Brahman community is nothing special to them; and it imposes no legal duty on them. They have the right equally and in common with persons of other castes. It is logically impossible that such an equal right of worship could give rise to any ceremonial precedence in favour of one caste over another such as could be enforced in a Court of Law. Claims to precedence and other mere dignities or honours claimed in the exercise of the right of worship are not of a civil nature; the law is clearly stated so in *Nagiah Bathudu* v. *Muthacharry*.[5]

"Temples are intended for all castes; but there are restrictions of entry. Ordinarily, the Brahmans alone would be entitled to access into the inner shrine of the temple." (*Gopala Muppanar* v. *Subramania Aiyar*[12]). The exclusive right of a caste to worship from particular places in the temple may be cognizable by a Civil Court. But the right to worship from particular places in the temple cannot entitle the members of that caste to any honours; for, there is no legal duty or service on their part in return for which the honours can be claimed.

K.C.G.

To

THE EDITOR,

"MADRAS LAW JOURNAL."

THE HINDU WOMEN'S RIGHTS AMENDMENT ACT.

(*Vide* 55 M.L.J., Part 3.)

CROSS NOTES ON CLAUSES.

It is well to remember in general that a codification of a portion of the law is bound to be defective without corresponding changes in the other portions of the uncodified law affected or likely to be affected by it.

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4. (1863) 1 M.H.C.R. 301 (306).
5. (1900) 11 M.L.J. 215 at 226.
12. (1914) 27 M.L.J. 253 (261).

Section 2 contemplates a competition between the adoptive mother and the adopted son only. Section 8 provides that in case of property passing by inheritance or survivorship to a son the widow shall get a share equal to that of the son.

Neither section expressly provides as to the working out of the share of the mother in the case of birth of sons subsequent to adoption. Is it the intention of the framers of the Act to leave the competition between the subsequent natural born sons and the adopted son to be governed by the existing provisions of Hindu Law? Does section 2 abrogate the existing distinctions and give only one-fourth to the adopted son? As it is the share of the mother will have to be worked out after deducting the share of the adopted son. If so it might happen in some cases as for example when there are three subsequent natural born sons, an adopted son, and the widow mother the share of the natural born son will be smaller than that of the adopted son. Is it the intention of the framers? In any event is it not better to standardise the rule equitably by saying that in case of competition between the subsequent natural born sons, an adopted son and the widow mother the natural born son shall take twice or thrice as much as the adopted son and that the widow mother shall rank as or take as much as the natural born son. What about the property of the mother after her death? Is the adopted son to get a share? Or is he not to get at all in the presence of the natural born son? If he is to get is it on the same ratio?

COMPETITION BETWEEN THE WIDOW AND THE DAUGHTER.

The Act as it stands does not give any right of property to the daughter in the absence of her brother so long as the widow is alive. May it not be amended by saying that in the absence of the son the daughter shall take as much as or half as much as the natural born son and the residue shall go to the widow. That will be more in consonance with the spirit of section 4. In this view section 7 will have to be amended. Section 7 (*b*) stops with the daughter. May it not be extended as far as the daughter's son and may not a daughter's daughter be made to rank as a daughter's son especially in view of the new privilege accorded to her in section 12. May not again the daughter in competition with the adopted son be allowed to take as much as the widow mother.

Section 6.—Once the reason of the rule of the exclusion of females from inheritance as Nirindriyas is put aside as not being in consonance with the spirit of the times is there any-

thing on principle to prevent the enlargement of the widow's estate to a full estate. There can be no objection even on grounds of sentiment to the enlargement suggested so far as females born in the family are concerned. The Act lets in a number of female heirs and by giving them a widow's estate lets in a great number of reversioners giving occasion for a number of unhealthy and self-detrimental expedients by the limited owners to bar the reversion and an equal number of reversionary suits. The aforesaid limitation is sure to give rise to more imprudent alienations, doubtful titles and wasteful litigation of little advantage to the limited owner or the reversioner. The present-day litigation with respect to the widow's estate must serve as an eye-opener.

SUCCESSION TO STRIDHANAM.

If there should be no distinction between male and female in the matter of inheritance to the paternal estate it stands to reason that reciprocally the males should be allowed to partake of the Stridhanam property along with females of the same degree of relationship now entitled to inherit. Such a provision should be incorporated in the Act.

Section 11.—Could not the well-meant provisions of the Act with respect to the inheritance of daughters be rendered nugatory in the Mitakshara school of Hindu Law. According to the Act the daughter is entitled to inherit to the paternal estate and under section 11 might enforce her right to partition off her share. But she is not entitled to any interest by birth in the ancestral estate to which her brothers will be entitled. Supposing all the brothers to shut out the sisters alienate their undivided interests while the father is alive, could the daughter prevent it. In that event only the father's share if still undisposed off would be available for partition after the death of the father in which also the brothers would be entitled to share. Under such circumstances the daughters getting half as much as the sons may get next to nothing. The same difficulty may arise in the case of the widow mother also. Some provision should be made to avoid this kind of circumvention of the Act.

R. NARASIMHAIYER.

TUTICORIN,
21st August, 1928.

SUMMARY OF ENGLISH CASES.

In re DUCKER'S TRADE MARK, (1928) 1 Ch. 405.

*Trade mark—Registration of—*Bona fide *intention to use—Meaning of—Trade Marks Act, S. 37:*

Where the owner of certain goods registered the trade mark without any intention of using the mark at the time of the registration but really as a sort of precaution in order that she may have something that may be of some service to her if difficult times should come,

Held, that the mark cannot be said to have been registered with a *bona fide* intention to use it as per section 37 of the Trade Marks Act.

On the construction of section 37 of the Trade Marks Act the intention to use is a present intention to use it.

ROYAL LONDON MUTUAL INSURANCE SOCIETY, LTD. *v.* BARRETT, (1928) 1 Ch. 411: 97 L.J. Ch. 177.

Insurance—Policy of—Stipulation that the policy shall be void if death occurred by suicide—Exception in favour of bona fide *third parties—Money advanced on mortgage by company itself—Right of company to enforce mortgage.*

A life insurance policy issued by a company contained a stipulation that the policy shall be void if death was caused by suicide, but provided that the directors might allow to the policy-holder such part of the sum assured as they thought fit and that the policy shall remain in force to the extent of the pecuniary interest of third parties *bona fide* acquired for valuable consideration. The life insurance company advanced money to the policy-holder on a mortgage of his leasehold properties and on an assignment of the policy by way of security. The policy-holder committed suicide and the company sought to enforce the security against the leasehold property comprised in the mortgage.

Held, that the expression "third parties" did not include the policy-holder and that the company was entitled to enforce the mortgage of the leasehold property.

In re CHARDON JOHNSTON *v.* DAVIES, (1928) 1 Ch. 464.

Will—Trust to pay income to a Cemetery Company for maintenance of graves—Rule against perpetuities.

A testator directed by his will that he gave to his trustees a sum of £200 "upon trust to invest the same upon any of the investments therein authorised and pay the income thereof to a cemetery company during such period as they shall continue and keep the graves of his great-grandfather and another in the said cemetery in good order and condition with flowers and plants thereon as the same had hitherto been kept by him." The clause further provided that if the graves should not be kept in the order and condition thereinbefore specified the trustees should pay and apply the said income under the subsequent clause in the will relating to the residuary estate of the testator.

Held, that the trust did not offend the rule against inalienability and the rule against perpetuities.

CATTON *v.* ASHWELL AND NESBIT, LTD., (1928) 1 Ch. 484: 97 L.J. Ch. 199.

Workmen's Compensation Act, S. 12—Accident to workman—Voluntary payments of compensation at maximum rate payable in total incapacity—Subsequent application for review by employer on the ground of cessation of incapacity—Stoppage of weekly payments—Action by workman for damages for breach of statutory duty—Maintainability.

The plaintiff who was a fitter in the employment of the defendants, on the 1st August, 1925, suffered personal injury from an accident which entitled him to compensation under the Workmen's Compensation Act then in force, and the defendants paid him compensation at the maximum rate. Before 16th July, 1927, the date of the last weekly payment, the defendants had given notice to the plaintiff that they intended to claim that his incapacities ceased on 30th May, 1927 and that their obligation to pay had then come to an end. On 24th June, 1927 the defendants applied to the County Court for an arbitration by way of review under S. 11 of the Act of 1925 and for an award that since the plaintiff was under no incapacity as from May, 1927 he was no longer entitled to compensation. On 16th July, 1927 the defendants paid into Court, with a denial of liability, the sum of £24 as representing the weekly dues from that date to October 14, the date fixed for the hearing of the application for review. On the 29th October, 1927 the plaintiff commenced this action claiming a declaration that the defendants, having a liability to pay compensation and having paid such compensation until 23rd July, 1927, had since that date committed a breach of their statutory duty in that they ended the weekly

payments otherwise than in pursuance of an agreement or an arbitration, without having brought the case within any of the excepted cases mentioned in section 12 of the Act of 1925.

Held, that the plaintiff had no independent cause of action under section 12 of the Act of 1925 to require his employers to go on making payments to him after the issue as to the continuance of his incapacity has been raised, down to the time when it is determined, even though such *de facto* payments may be recoverable eventually from him by the employers.

Semble: Whether an independent exterior right can be enforced, as by section 21 of the Act of 1925 the question relating to the amount or duration of compensation has to be settled by arbitration.

In re SPENCER AND HAUSER'S CONTRACT, (1928) 1 Ch. 598.

Vendor and purchaser—Auction sale—Statement that vendors were selling as "trustees for sale" under a Will—Will not containing trust for sale—Vendors offering to make a good title by conveying as legal personal representatives of testator—Purchaser if can repudiate contract.

In a sale of a freehold dwelling-house by auction, it was stated that the vendors were selling as "trustees for sale" under the Will of a certain person. The Will, however, did not contain any trust for sale. The auction purchaser stated that he was entitled to repudiate the contract as the vendors had no right to sell the property. The vendors alleged that the statement that they were selling as "trustees for sale" was a mistake and that they can convey the property as the legal personal representatives of the testator and thus convey a valid title to him. The vendors took out an originating summons to have it declared that the objections of the purchaser to the title to the property had been sufficiently answered by the applicants and that a good title to the property had been shown by them as personal representatives of the testator notwithstanding that by error they were stated in the said contract as "trustees for sale" under the Will.

Held, that the erroneous statement did not amount to a warranty by the vendors as to the particular form in which title would be made but it only indicated the method in which the vendors contemplated making a title and that, as the vendors were able to make a good title, though by another method, the purchaser was not entitled to repudiate the contract.

ELLERMAN LINES, LIMITED *v.* READ, (1928) 2 K.B. 144.

Foreign judgment—Jurisdiction of British Court to restrain its enforcement by injunction.

A British Court has no power to grant an injunction restraining a foreign Court from acting. But a British Court can grant an injunction restraining the enforcement of a judgment obtained by a British subject in a foreign Court where it is shown that the British subject obtained the judgment by fraudulently breaking his contract or by fraud, for in granting such an injunction the British Court is not asserting jurisdiction over the foreign Court but only prevents the person, who is in conscience debarred from attempting to enforce a judgment, from enforcing it.

DEE CONSERVANCY BOARD *v.* MCCONNELL, (1928) 2 K.B. 159: 97 L.J.K.B. 487.

Negligence—Sinking of ketch in river due to negligence of owner—Consequent obstruction of navigation of the river—Liability of owner of ketch for damages—Measure of damages.

Due to the negligence of the defendants who were the owners of a ketch, the ketch was sunk in a river and in consequence thereof the navigation of the river was obstructed. The wharf by the side of the river was also obstructed. The defendants abandoned the ketch after its sinking. The Conservator of the river and the owner of the wharf removed the obstruction by spending moneys out of their pocket and brought the present action to recover the amounts spent from the defendants.

Held, that, as the ketch sank due to the negligence of the defendants, they were liable for the damage caused by the obstruction to the navigation of the river and to the approach to the wharf, and the measure of such damages was the reasonable cost of removing the obstruction.

ENGLISH HOP GROWERS, LTD. *v.* DERING, (1928) 2 K.B. 174.

Contract—Society for the sale of hops—Agreement between society and a member thereof that all hops grown on his land should be delivered to the society—Member leasing land to a company—Hops pickable on the land at the commencement of the lease—Right of society to damages—Amount fixed in the agreement as damages—Penalty or liquidated damages.

The defendant was a member of the plaintiff society, the object of which was to organise the marketing of home-grown hops by their sale through them. By an agreement in writing made between the plaintiffs and the defendant, the defendant agreed to deliver to the plaintiffs all hops grown by him during the year 1926 on certain land consisting of 63 acres so that the same might be sold by the plaintiffs.

The agreement further provided that if the defendant should fail to deliver to the plaintiffs any hops produced by him during the year 1926 on the 63 acres or should by himself or an agent or factor or in any way otherwise than through the plaintiffs dispose of those hops, the defendant should pay to the plaintiffs as and for liquidated damages the sum £100 per acre. In July, 1926 the defendant leased to a company for a term of five years the 63 acres. When the lease commenced, the hop vines on the 63 acres had grown to such an extent that the hops were formed and pickable, though unless there was some urgency they would not be picked till some days later. The hops grown on the 63 acres were not delivered to the plaintiffs. The plaintiffs brought the present action to recover £6,300 as damages at £100 per acre, which was the amount fixed in the agreement.

Held, (1) that the defendant had committed a breach of contract by not delivering the hops to the plaintiffs as the defendant had grown or produced a hop crop up to the point when it was pickable though it would be better to wait for a few days;

(2) that the agreement was not in restraints of trade and therefore not unreasonable; and

(3) that the fixing of £100 per acre as damages was not penal but the sum was only liquidated damages.

Per Scrutton, L.J.—It is well established that the Courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties with more favour than they will regard contracts between master and servant in unequal positions of bargaining.

If in a case where breach of a contract may occasion serious damage but damage which is difficult to value exactly, people contracting on equal terms agree beforehand to value or ascertain beforehand a conventional figure which shall represent on an average the probable damage from breaches of the same kind, such damages are not penalty but only liquidated damages.

H. J. GREEN (INSPECTOR OF TAXES) *v.* J. GLIKSTEN & SON, LTD., (1928) 2 K.B. 193: 97 L.J.K.B. 433.

Income-tax—Company carrying on business as timber merchants—Value of timber in Company's accounts—Loss of timber by Fire Insurance against fire—Insurance amount exceeding amount at which timber valued in books—Duty of company to include entire insurance amount in profit and loss account—Income-tax Act, Schedule D, Case 1.

A company carrying on business in timber valued the timber at cost or market value, whichever was the lower, and wrote large sums off the cost price in respect of depreciation in order to arrive at the closing stock values. The reduced sums so arrived at were adopted every year to arrive at the Company's profits for income-tax purposes. The company had insured its stock against loss by fire and for this purpose the stock was valued at replacement value.

Certain quantity of timber belonging to this Company was destroyed by fire, and the Insurance Company paid a large amount in respect of the replacement value. But the estimate at book value of the same was only about a third of this amount. The Company brought this estimate at book value into its accounts as a trading receipt but carried forward the balance of the amount received from the Insurance Company into the balance sheet as a reserve without bringing it into the profit and loss account.

Held, that the entire amount of money received from the Insurance Company must be brought into the profit and loss account as a trading receipt for the purpose of estimating its profits for income-tax purposes.

RECKITT *v.* BARNETT, PEMBROKE AND SLATER, LTD., (1928) 2 K.B. 244: 97 L.J.K.B. 407.

Principal and Agent—Power of attorney—Power to draw cheques—Agent drawing cheque for his private purposes—Payee of cheque when protected.

The plaintiff executed a power of attorney in favour of a person to endorse or sign the plaintiff's name to any cheque. A doubt was raised by the plaintiff's bankers as to whether this power authorised the agent to draw cheques and the plaintiff wrote to them that he wished the power to cover the drawing of cheques drawn upon the bank by the agent "without restriction". The agent drew a cheque upon the plaintiff's bank payable to the defendant in payment of a private debt of his own

and signed it as plaintiff's attorney. The plaintiff, on coming to know of this, brought the present action against the defendants to recover the amount of the cheque as damages for conversion or as money had and received by them to the plaintiff's use.

Held, by the Court of Appeal (Russell, J., dissenting), that the power of attorney must be construed along with the letter written by the plaintiff to his bank and, if it was so read, it had the effect of enabling the bankers and third parties to accept with saftey the cheques drawn by the agent as the plaintiff's attorney, in the absence of any knowledge or notice on the part of the defendants of any irregularity in the transaction.

GARDINER *v.* HEADING, (1928) 2 K.B. 284.

Principal and Agent—Order given by agent—Work done in pursuance of order—Part payment of remuneration—Credit given to principal under mistaken impression—Liability of agent.

The defendant had given the plaintiff an order for some building work for a company of which the defendant was a director. The plaintiff did the work. Not having been paid for it, he went to the office of the company and saw the defendant who asked the plaintiff to meet him the next day as he had another job for him. The plaintiff called subsequently and the defendant gave him the work. Thinking that the work had been ordered on behalf of the company the plaintiff made out estimates as the work proceeded and addressed them to that company. When the work was finished, he was paid a certain amount on the account. When subsequently he tried to get the balance, he was informed by another director of the company that the work had not been ordered for that company but for another company. The plaintiff thereupon brought the present action against the defendant for recovery of the balance. The defendant contended that as while the work was being done, the plaintiff had given credit to the company, he was not personally liable.

Held, that the plaintiff having given credit to the company up to a certain date under a mistaken impression and not having given credit to the defendant before the work was completed, the defendant was personally liable for the balance.

There is no reason why a man who contracts with another, thinking he is an agent, should not sue him when he finds out that he is the real principal, provided the supposed agent has

not expressly contracted as agent so as to exclude his liability as a principal party to that contract.

AUCHTERONI & CO. v. MIDLAND BANK, LTD., (1928) 2 K.B. 294.

Bill of exchange—Sale of goods—Drawing of bill—Acceptance of bill payable at vendee's bank—Loan by bank to acceptor to meet bill—Bill endorsed in blank by payee—Presentation of bill for payment by servant of payee—Payment of bill over counter by acceptor's bank—Conversion of money by payee's servant—Liability of acceptor's bank to payee.

The plaintiffs, a partnership firm carrying on business at Liverpool, sold certain goods to a company which also carried on business at Liverpool and for payment of the goods so supplied the plaintiffs drew upon the company a bill payable three months after date and the company accepted the bill payable at the defendant bank where they kept their account. The company, three days before the bill fell due, notified the defendant bank that they had accepted the bill which had been drawn by the plaintiffs and asked the defendant bank to order payment of the amount and charge to its account. The defendant bank were willing to act upon this advice and to pay the bill. After the bill was due one *W*, who was the plaintiffs' cashier, brought the bill to one of the partners of the plaintiffs' firm and asked to have it endorsed and the partner endorsed it in blank in the usual way. It was then the duty of *W* to take the bill to the plaintiffs' bank and that bank would in the usual course have collected the amount of the bill through the Clearing House and credited to the plaintiffs' account accordingly. Instead of doing this he presented it himself over the counter to the defendant bank, received the money and fraudulently converted and stole it. The plaintiffs then brought this action against the defendant bank, who were the acceptor's bank and not the payee's bank, to recover the amount of the bill. The action was based upon three grounds. The first head of claim was to recover damages for negligence, the second head of claim was for money had and received and the third head of claim was in respect of the conversion of the bill. Evidence was given at the trial that each one of a number of acceptances of which the plaintiffs were holders had been paid by the defendant bank to the plaintiffs' bankers. Evidence was also given with regard to the course of business in Liverpool in connection with the collection of bills which proved a

practically universal custom that trade bills especially for large amounts should be presented to the bank at which they were accepted as being payable through the Clearing House. But the evidence also proved that the presentation of such bills at the counter was not irregular though unusual.

Held, (1) that the first head of claim was ill-founded, as a claim for negligence must be based on the ground of some duty binding the defendants to exercise care on behalf of the plaintiffs, which in the present case could only arise from privity of contract which could not be said to exist between the defendant bank and the plaintiffs;

(2) that the second head of claim was equally baseless, as the drawing of the bill did not amount to an assignment in favour of the payee of funds of the drawee and as in the present case the acceptors had no funds available at the due date but the defendant bank were willing to lend sufficient funds to meet the bill because the amount fell within their authorised limit of overdraft; and

(3) that the defendant bank was not liable for the conversion of the bill as the bill was a negotiable instrument and they dealt with it in good faith and for value in accordance with the law merchant.

A bank is not bound to make enquiries merely because a bill endorsed in blank is presented over a counter. The law merchant has always recognised such presentation as due presentation sufficient to require the bankers, in the absence of very special circumstances of suspicion, to pay.

HARDIE AND LANE, LTD. *v.* CHILTON, (1928) 2 K.B. 306 (C.A.): 97 L.J.K.B. 539.

Trade Union—Infringement of rule by a trader—Association demanding and accepting money payment instead of putting the name of the trader on the "stop list"—Money if can be recovered back.

A rule of a Trade Union framed to prevent traders or agents from selling articles at prices other than those fixed by the association was enforced by putting those contravening it on a "stop list", the effect of which was that no member of the association would supply goods to those infringing the rules. In a particular case the association instead of putting the trader who infringed the rule upon the "stop list" allowed him to escape this by paying a sum of money towards the expenses of the association. The trader brought the present action to recover the

amount paid by him to the association on the ground that the amount was obtained by duress.

Held, that the money paid to the association cannot be said to have been paid under duress and that, therefore, the action must fail.

CONQUER *v.* BOOT, (1928) 2 K.B. 336.

Res judicata—*Breach of contract—Suit for damages—Subsequent suit for damages for breach of the same contract alleging different particulars of damage—Maintainability.*

The defendant agreed to build for the plaintiff a bungalow in a good and workmanlike manner. After the bungalow was erected the plaintiff brought an action against the defendant claiming damages for the breach of the contract, and the particulars of claim stated that the amount was claimed for breach of contract to complete in a good and workmanlike manner and 17 items were set out. The action was decreed. Subsequently the plaintiff brought the present action in the same Court. The claim was identical in its terms with that in the first action, except on the amount of damages claimed and that after the words "in a good and workmanlike manner" the words "and with proper materials" were added. The particulars set out some 14 items differing from those in the former action but of the same character. The defendant set up the defence of *res judicata.*

Held, that the suit was barred by *res judicata* as the cause of action was the same as in the prior action, namely, breach of the contract.

A DEBTOR *In re.* THE PETITIONING CREDITOR *v.* THE DEBTOR, (1928) 97 L.J. Ch. 255.

Bankruptcy Act, S. 5 (3)—*"Sufficient cause"—Two distinct debts—Refusal by creditor of tender of one debt—Object of creditor to maintain total debts above* £50.

Where two distinct debts were owing to a creditor by the debtor and the debtor tendered the amount of one debt but the creditor refused the tender with the object of maintaining his total debt above £50 so as to be able to have the debtor adjudicated bankrupt.

Held, that there was "sufficient cause" for dismissing the creditor's petition for adjudication under S. 5 (3) of the Bankruptcy Act.

MALLETT (INSPECTOR OF TAXES) *v.* STAVELEY COAL AND IRON CO., 97 L.J.K.B. 475.

Income-tax—Capital or income—Surrender of lease by mining company—Amount paid to lessor for surrender—Income-tax Act, Schedule A, No. III, Schedule D, Rule 3.

A company which had a mining lease entered into an agreement with the lessor by which the area subject to the lease was diminished and the lessor accepted a surrender of certain seams of coal comprised in the lease in consideration of a payment of £6,500 by the company to the lessor.

Held, that this sum of £6,500 was paid for the purpose of disposing of a capital asset of the company which had become burdensome to the company and was not a sum wholly and exclusively expended for the purpose of selling the coal in which the company traded and consequently could not be deducted from the company's profits assessable to income-tax.

BROOKE *v.* BOOL, 97 L.J.K.B. 511.

Negligence—Landlord and tenant—Tenant's permission to landlord to visit premises at night—Smell of escaping gas coming from premises—Search by landlord and lodger with naked light—Explosion and consequent damage to tenant's goods—Liability of landlord for damages.

A tenant of a lock-up shop had invited the landlord who occupied adjoining premises communicating internally with the shop to visit the shop at night from time to time to see that everything was secure. One night a lodger of the landlord told him that he could smell an escape of gas in the shop. The landlord accordingly got up and went into the shop accompanied by the lodger. In the shop there was a gas pipe running down from the ceiling, terminating in a gas burner accessible from the floor. The landlord applied a naked light to the lower part of the pipe and found no escape of gas there, and then the lodger got upon to a counter in order to examine the upper part of the pipe. He examined this also with a naked light and an explosion followed resulting in damage to the tenant's goods in the premises. The tenant sued the landlord alleging that the damage was due to his negligence.

Held, that the defendant was liable on three grounds, namely, (1) on the ground of agency, that is to say, that the defendant impliedly invited and instructed the lodger to get upon the counter

and complete the examination; (2) on the ground of control of the proceedings, that is to say, that the lodger was there by the permission and invitation of the defendant and the defendant was in control of the enterprise; and (3) on the ground of a joint enterprise on the part of the defendant and the lodger and that the act which was the immediate cause for the explosion was that joint act done in pursuance of a concerted enterprise.

Held (*per* Talbot, J.) that the defendant was liable on a further ground, namely, that he was bound to have taken proper and reasonable care to avoid damage resulting from the examination of the shop and its contents, having undertaken the examination, and he could not escape liability for the consequences of failure to discharge the duty by getting some one else to make the examination whether that person was an agent or a servant or contractor or a mere voluntary helper.

SIMEONS & Co. *v.* DURAND TRUSTEE, 97 L.J.K.B. 537.

Bankruptcy Act, S. 38—Purchase of goods before date of receiving order—Receipt of delivery orders before bankruptcy—Presentation of delivery order after the date of receiving order—Reputed ownership.

The plaintiffs purchased certain goods from a person by paying for them before the date of the passing of a receiving order made against the vendor on his own petition. Delivery orders were signed by the agent of the vendor and given to the plaintiffs before the date of the receiving order; but the plaintiffs presented them at the wharf, where the goods lay, only after the date of the receiving order.

The wharfinger refused delivery on the instructions of the bankrupt's agent. The plaintiffs thereupon brought an action against the bankrupt's agent. The trustee in bankruptcy claimed the goods as forming part of the bankrupt's estate on the ground that they were in the possession, order, or disposition of the bankrupt at the date of the receiving order.

Held, that the goods could not be said to be in the reputed ownership of the bankrupt so as to form part of the estate of the bankrupt divisible among the creditors under section 38 of the Bankruptcy Act.

JOTTINGS AND CUTTINGS.

Their Knowledge of the World.—There never was a time when the Judges were not shot at for their alleged ignorance

of the current world. It was in Lord Kenyon's time, during a discussion on the "Adultery Prevention Bill," that the Earl of Carlisle made reference to the Chief Justice, saying that : "Like most of his brethren, he was a legal monk, a cloistered gownsman". The observation was well calculated to provoke Lord Kenyon's ire, and it did. "Somebody tells us," said he, "that the Judges are legal monks, knowing nothing of the world! What is the world? It is necessary to define terms, in order to know what the world is, and what is meant by this knowledge of the world. If it is to be got by lounging about Bond Street, like young men of fashion, or at gaming-tables, or at the course of Newmarket, or in private houses of great men, or in brothels, I disavow being acquainted with it; but surely something of what may be truly called a knowledge of the world, *quicquid amant homines*, may be contained in courts of justice".

Of course, different men see different aspects of the world. There is, for example, Lord Buckmaster, who knows what a "pub" is; and Lord Birkenhead, who does not?—*L. J.*, p. 33.

Spiritualism and Fortune-telling.—Of all the forms of prosecution which obsolete laws compel the police to institute, prosecutions for fortune-telling are perhaps the most absurd, and the absurdity is heightened when the prosecution, as in the case of Mrs. Cantlon and Miss Phillimore, decided at the Westminster Police Court by Mr. Oulton on Tuesday, involves inquiry into the veracity of spiritualistic mediums. The magistrate, with the wisdom that marks the Metropolitan Bench, is careful to keep an open mind. He has, he says, lived long enough to know that there are a great many things in the world of which we cannot be certain. It is an old reflection:

"There are more things in Heaven and earth, Horatio,
Than are dreamt of in your philosophy."

And so he does not touch the spiritualism, but when by design—or was it only by chance?—the medium makes a little incursion into the future, it becomes fortune-telling, and is a case, if not for a penalty, yet for payment of costs. It must be sixty years now since Browning castigated Mr. Sludge, "The Medium":

"Sludge begins
At your entreaty with your dearest dead,
The little voice set lisping once again,
The tiny hand made feel for yours once more,
The poor lost image brought back, plain as dreams."

And now we have Sir Oliver Lodge giving evidence that Psychical Research requires the employment of mediums, and Sir Conan Doyle protesting in a letter to Thursday's *Times* against any interference by the law with spiritualism. Possibly, since the crude table-rapping of Mr. Sludge, the cult has advanced in repute, and, at any rate, as Sir Arthur says, all registered spiritualistic churches and all serious societies for the study of psychic matters should be exempt from police prosecution. As to these matters, most people will, like Mr. Oulton, express no opinion. And as to fortune-telling itself, the days when the public required protection against witchcraft and other forms of occult science are gone.—*L.J.*, 1928, p. 58.

Working of the Morality Act.—"An Act to regulate the publication of reports of judicial proceedings in such manner as to prevent injury to public morals," cited as the Judicial Proceedings (Regulation of Reports) Act, 1926, has now had a fair trial; and events have shown that it suffers from the defects of all statutory moral effort of the like nature. The Bonn case has provided the most modern example of its futility.

The Court was crowded with so much of the general public —largely women of apparent affluence—as could secure admittance; and the trial went on for many days, during which these incorruptible ladies gave ear to such details as no proprietor, editor, master printer or publisher would have published to the crowd outside, in the comparative coldness of print, under pain of (not exceeding) four months' imprisonment or a fine not exceeding five hundred pounds or both such imprisonment or fine. So the large reading public who might be interested in such matters were deprived of news, save only of the fact that the Bonn case was proceeding, while the select hearing public knew all—far more than any newspaper would publish even if the Act had not been passed.

Then came the summing-up of the Judge and his lengthy observations on a "flaming" case; the reading public got that verbatim and their thirst for information was in part assuaged.—*L.J.*, 1928, p. 68.

Prof. Morgan on the Bureaucrats.—We are glad to call attention to two articles on the increasing powers of Bureaucracy which Prof. J. H. Morgan, K. C., has contributed to the *Evening News* (July 26, 27). Prof. Morgan is well known

as a vigilant critic of this development of modern government, and in these articles he marshals the facts with ruthless cogency. In effect, he says, we are now governed, not by Acts of Parliament, but by statutory orders made under provisions which Government Departments have themselves introduced into the Bills they draft, and which are swallowed by an unsuspecting Legislature. In 1920, the number of Acts of Parliament was 67; the number of S.R. & O. made by the Departments was 2,110; in other words, for every statute there were 31 statutory orders; and in 1927, the proportion was the same. Prof. Morgan reminds a wide circle of readers that nearly every statute to-day is "skeleton legislation"; a framework to be filled up as the Department pleases with practically no check from the Legislature. The only check is in the Courts, but with all the activity which the Courts and individual Judges have displayed since Lord Cozens-Hardy called attention to the matter in 1911, this check is useless if the Government draftsman has succeeded in keeping within the statutory powers. Prof. Morgan's articles are, perhaps, the strongest indictment there has been of Departmental methods.—*L.J.*, 1928, p. 76.

The "Fools and Rogues" Bill.—The Companies Bill, after much buffeting and amendment in the House of Commons, reappeared in the House of Lords on Monday, and after a short and facetious commentary by certain of the peers, was safely conducted through its second reading by the Lord Chancellor. So a measure of very great moment, the most effective clauses of which were not secured without a remarkably stubborn and skilful fight by certain legal members of Parliament who are authorities on company law, may be regarded as safe and will forthwith appear on the Statute Book.

"A sort of fools' charter" was how Lord Hunsdon described it; its object was, said he, to protect the fool and punish the rogue, an object which, if successful, would be for the greatest good of the greatest number. More truly did Lord Hailsham describe it, "not as a fools' charter, but a measure to prevent rogues from swindling the unwary public. An urgent measure also, which provided an opportunity of preventing those frauds which were swindling and depriving of their means and driving to ruin a great many people who could not afford to have their savings swept away."

It will be a great act, indeed, which will make our company law really fool-proof and rogue-proof; while the "unwary public"

continue to love a gamble and the company promoters are anxious to meet the demand. Perhaps, in the last resort, it will be found expedient to recognise the fact and to regulate the follies of the fortune-hunters when it is found impossible to cure them.—*L.J.*, 1928, p. 84.

A Great Moslem Jurist.—The career of Mr. Ameer Ali, who died on the 3rd instant, is a striking illustration of the diverse experience which the members of the Judicial Committee bring to the solution of the problems with which it deals. Graduating at the Hooghly College, Calcutta, in 1867, Mr. Ameer Ali came to London with a State scholarship, and was called to the Bar at the Inner Temple in 1873. From that date onwards he was equally busy in professional practice at the Calcutta Bar—soon followed by magisterial functions—and in literary work dealing with Mahomedanism on its historical and its legal sides. In 1884 he became Tagore Professor in Law at Calcutta University, and in 1890 he was appointed a Judge of the Bengal High Court, the first Muhammadan to attain to that rank. He retired in 1904, and coming to this country he was in 1909 appointed to be a member of the Judicial Committee where he was joined afterwards by Lord Sinha, and Mr. Ameer Ali contributed his full share to the work of the Committee. Under the existing arrangements as to appeals from the Dominions, that work consists mainly of Indian appeals, and the Committee has been fortunate in having these eminent Indian jurists associated with it. And though a consistent adherent of Islamism, Mr. Ameer Ali was equally strong in his advocacy of Anglo-Islamic friendship.—*L.J.*, 1928, p. 89.

Fortune-telling Law.—The course and ending of the recent Police Court case in which the leading spiritualists figured so prominently is generally regarded as unsatisfactory; not because of any impropriety in the mode in which it was brought and conducted, but because these fortune-telling enactments, like those relating to witchcraft and other crimes of mediæval gravity, are now obsolete and absurd, and Sir Arthur Conan Doyle and Mr. E. P. Hewitt, K. C., join in the expression of what must be regarded as a general consensus of enlightened opinion, that the fortune-telling provisions of the Vagrancy Act of 1824 should be repealed. "The cause," says Mr. Hewitt, "waste of time and energy on the part of the police and magistrates, and lead to grave injustice to individuals."

The truth is that whether spiritualism is right or wrong, these prosecutions savour too much of religious persecution; and wise magistrates, as in the most recent case, while feeling themselves bound by the Act to convict, are in justice forced so to mitigate the penalty that the survival of the offence itself becomes absurd and ridiculous.—*L.J.*, 1928, p. 97.

Lord Mansfield's Method and Lord Campbell's Rebuke.—Lord Mansfield, C. J., on a similar occasion, when the penal laws against Roman Catholics had outstayed their welcome in English Law, set a valuable precedent for future generations of Judges when he was called upon to try a Roman Catholic priest for the criminal offence of saying Mass. First, he told the jury, the accused must be proved to be a priest, for unless he were a priest, the saying of Mass was no offence; secondly, it must be proved that he had said Mass. But the fact that he had celebrated Mass was not conclusive evidence that he was a priest, nor was the fact that he was a priest proof that the service in question was Mass. A verdict of "Not guilty" was the result.

Lord Campbell, C. J., a zealous Protestant, expressed his strong dislike of Lord Mansfield's method in this case, and considered it to be quite unjustifiable. In the learned biographer's view he should have applied the law strictly, so that, its injustice being made manifest, it might the more speedily have been repealed. No doubt Lord Campbell's would have been the more heroic method; but it would have been hard on the poor priest. And in England it is quite usual to allow institutions, like the stocks as a form of punishment, to rot from misuse rather than thow them into the legislative bonfire.—*L.J.*, 1928, p. 97.

The Old Witch and the Modern Medium.—Mr. John Marshall Gest, of Philadelphia, Penn., published in 1913 a very interesting volume called "The Lawyer in Literature," and in that book a remarkable chapter showing the influence of biblical texts upon English Law. There can be no doubt that our fortune-telling Vagrancy Act is not unrelated to those statutes of Henry VIII and Elizabeth which made witchcraft a frightful offence. "Thou shalt not suffer a witch to live" (Exodus 22, 18) is the Old Testament command, and sorcerers, charmers and consulters with familiar spirits are included in Deuteronomy 18, 9. Saul banished the wizards and the mediums, yet he had a seance,

says Mr. Gest, with the prophet Samuel, with the witch of Endor as medium. "And the command to kill witches," he says, "was transplanted to England after an interval of over two thousand years," as though the mandatory injunction were intended to apply everywhere and for all time, and formed the basis of those statutes of Henry and Eliza which tortured and destroyed so many wretched old Englishwomen, and were not repealed until the year 1736.

And now we are at it again! In vain did the spiritualists disclaim any interest in fortune-telling, and lay stress only on spiritual communion. The average citizen, like Saul and Macbeth, has little use for unforetelling spirits.—*L.J.*, 1928, p. 97.

The Brighton Reprieve.—The Home Secretary at the last moment has advised a reprieve in the case of the three men, Taylor, Weaver and Donovan, who were convicted at the last Sussex Assizes before Mr. Justice Avory of the murder of Mr. F. E. Smith, who died on May 18 as the result of injuries received on April 14. Mr. Justice Avory, it is needless to say, is a very experienced and careful judge. He gave the jury the chance of returning a verdict of manslaughter which they declined to take; though, of course, this is irrelevant if the men were in fact not guilty at all. The appeals of the men were dismissed by the Court of Criminal Appeal, Lord Hewart agreeing that the evidence was circumstantial, but observing that it was not on that account less convincing. The result was considered by the Home Office, and so recently as Monday it was announced that the sentence would not be interfered with. The men were to have been executed on Wednesday. Sir William Joynson-Hicks returned to London on Tuesday to give further consideration to the case, and on Tuesday evening an announcement was issued from the Home Office that, after the most anxious review of all the circumstances, the Home Secretary had decided to rescind his previous decision, and had advised the commutation of the sentence of death in the case of each prisoner to one of penal servitude for life.—*L.J.*, 1928, p. 104.

The Effect of the Reprieve.—The Home Secretary issued on Wednesday a statement explaining this sudden change in which he points out that "his recommendation for the exercise of the Royal prerogative does not cast any reflection upon the justice of the jury's verdict or the decision of the Court of Criminal

Appeal. But he has felt just that element of doubt in this case which, in his opinion, makes it undesirable that the irrevocable penalty should be inflicted." We are not in a position to review the evidence given at the trial, nor do we know what further information has been received by the Home Secretary. But obviously this incident, following so closely on the reversal after 20 years of the conviction of Oscar Slater—now recompensed in accordance with the view we expressed with a gratuity of 6,000*l.*—will make it increasingly difficult to inflict the death penalty. Whatever justification there may be for that penalty, it is open to the fundamental objection that it allows for no possibility of mistake, although it is well known that mistakes do occur. We have quoted before, and we quote again, Lord Shaw's words in commenting on a case of what he describes as "judicial murder." "Every human judgment is mingled with human error, and in the issues of life and death no judge should be charged with an irrevocable doom." Sir William Joynson-Hicks has, notwithstanding the proceedings at the Assizes and before the Court of Criminal Appeal, felt the scintilla of doubt which made the triple execution impossible. We are glad of the result, and we admire his courage in not abstaining from reversing his own decision so recently given. But a penalty which depends so clearly on the Home Secretary for the time being having a mind capable of doubt becomes itself the subject of increasing doubt.—*L.J.*, 1928, p. 104.

Oscar Slater.—The Lords Commissioners of his Majesty's Treasury have assented, on the recommendation of Sir John Gilmour, Secretary of State for Scotland, to a payment of 6.000*l.* being made to Mr. Oscar Slater as compensation for his wrongful conviction in May, 1909, for the murder of Miss Gilchrist in Glasgow, and the imprisonment which he suffered. The offer has been accepted.

In a letter, dated August 4, addressed by Sir John Lamb, Permanent Under-Secretary of State for Scotland, to Mr. Slater, it is said:—

The Secretary of State is accordingly prepared to arrange for an order on his Majesty's Paymaster-General for 6,000*l.* to be sent to you at any address which you may intimate to this office.

Alternatively he is prepared to arrange for the sum of 6,000*l.* to be placed to the credit of your account at any bank which you may specify.

He would be glad to be informed of your wishes in this connection.

The following reply was sent to the Scottish Office:—

146, Holland Street,
Glasgow.
August 7, 1928.

SIR,—I duly received your letter of the 4th instant. I desire that you will place to my credit at the British Linen Bank, St. George's Cross Branch, Glasgow, the sum of 6,000*l.* which the Lords Commissioners of His Majesty's Treasury have agreed should be paid to me *ex gratia* for my wrongful conviction in May, 1909, and subsequent imprisonment.

I am, Sir, your most obedient servant,

OSCAR SLATER.

—*L.J.*, 1928, p. 115.

Automatic Control for Motors.—We print elsewhere letters criticising our recent remarks as to the necessity of curbing the excesses of motorists, and particularly of motor-cyclists. But on these matters we are impervious to criticism, and though opinions may differ as to the exact steps to be taken, the spate of letters in *The Times* recently shows the general agreement that the present scandalous state of affairs must be stopped. Lord Cecil has repeated in one of these letters the suggestion he made in the House of Lords on July 10 that motor vehicles should be subject to an automatic limit of speed. When that suggestion was made to the Motor Vehicles Committee, it was rejected as impracticable, but that, of course, does not dispose of it. If sufficient pressure was put upon the manufacturers, they would soon discover a way of making it impracticable for any machine to exceed the legal speed limit. We may apply Dr. Johnson's "immortal words," as they have been called: "Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." And it would concentrate the minds of the motor manufacturers wonderfully if they knew that there was a fine of 50*l.* a day for every machine sent out without an automatic speed control, and in the case of motor cycles, an automatic silencer.—*L.J.*, 1928, p. 118.

The Present Remedies.—That, however, is for the future. It will require legislation, and, meanwhile, the present anarchy

of the roads has to be stopped under the existing law. The terms of that law are well known, and we have never understood how motorists can alter the law by breaking it. We know that there is such a thing as popular nullification of a law. John Hampden, it has been said, set the example by not paying ship money. That was on a great constitutional issue. Many motorists want to nullify the law for their private pleasure or business at the expense of the safety of the public. Whether the law should be altered by Parliament is another matter. It may be that for ordinary motor cars a speed up to thirty miles an hour might be allowed in the open country, though not beyond ten miles in towns and villages and their neighbourhood. And when Parliament intends that any such change should be made, it will make it. Although at present it has authorised the Railways to engage in road transport, yet it has not authorised the carrying on of road transport as if the roads were railway tracks. There are difficulties, no doubt. One is that, as Lord Justice Scrutton said in *Gowar* v. *Hales* [(1928) 1 K.B. 197] it is very difficult to get a criminal conviction against a motorist from a jury. That is because wrong ideas are current as to criminal negligence, and hence many bad cases of manslaughter and personal injury go unpunished. But if the authorities will concentrate on the prevention of speed and noise, the present troubles will be abated. Of course, directors of motor omnibus and coach companies who draw up schedules involving the exceeding of the speed limit should be heavily penalised.—*L.J.*, 1928, p. 118.

The Signing of the Pact.—The Peace Pact, which is the result of M. Briand's proposal to the United States of last December, was signed on Monday of this week. We give the text of it on another page. M. Briand's proposal was for a bilateral Treaty between France and the United States for the renunciation of war as an instrument of policy, and also for the settlement of all questions in dispute between the two nations by pacific means. But Mr. Kellogg, the United States Secretary of State, prompted by influential advocates in his own country of the suppression of war, turned this proposal to a wider use. If between two States, why not between all? And hence the American draft of a multilateral Treaty which was Mr. Kellogg's reply. Since the beginning of the year that draft has been under the consideration of the leading States of the world, and now the Pact has been signed in the terms,

save for an alteration in the Preamble, of the original draft. Attempts were made to alter or qualify it, but these were met on Mr. Kellogg's part with a quiet persistence in his own proposal, based, as he knew, on what the feelings of all peoples and the necessities of civilisation demanded. The States whose representatives signed the Pact on Monday included the United States, Great Britain, Germany, France, Italy, Belgium and Japan, and under the new equality of the States forming, under the Crown, the British Commonwealth, there were included also the Irish Free State, Canada, South Africa, Australia, and New Zealand. More than forty other States will be invited to adhere to the Pact.—*L.J.*, 1928, p. 131.

The Meaning of the Pact.—So far then, we have "the renunciation of war as an instrument of national policy." What the practical effect will be, remains for the future to unfold. The Pact is wider in its scope, but less definite in its terms, than the Covenant of the League of Nations. It is wider in its scope mainly because it includes the United States, and probably will include other States which are not parties to the Covenant. It is less definite because it does not, like the Covenant, provide for either judicial settlement of disputes or united action against aggressors. But under the Covenant, the Permanent Court of International Justice has been established, and the Pact should operate powerfully as a restraint upon aggression. As was said by Lord Cecil in the House of Lords on May 15, when the United States proposal was under discussion, it alters the rules and understandings of International Law. Hitherto it has been a plausible rule—Lord Cecil put it more strongly and called it a fundamental principle—that every sovereign nation is entitled to go to war when it thinks that it is desirable so to do in its own interests. That idea, whether it be a plausible rule or an accepted principle, is gone. The right of private war between States is taken away, and International Law is started on a new basis. Hence no State, if the Pact is observed, can conduct negotiations on the basis of its own military force. Military force is pooled for the restraint and punishment of aggressors. Negotiations, when they reach an *impasse*, can be resolved only by judicial process, or arbitration, or conciliation. This is the implication of the Pact. It is for statesmanship, with educated public opinion at the back, to realise it.—*L.J.*, 1928, p. 131.

Madras Bar Council—Elected Members.—Messrs. S. Srinivasa Aiyangar, T. R. Ramachandra Aiyar, T. R. Venkatarama Sastri, Alladi Krishnaswami Aiyar, T. Rangachariar, K. Bhashyam Aiyangar, K. P. M. Menon, P. Venkataramana Rao, K. S. Krishnaswami Aiyangar and S. Doraiswami Aiyar.

Nominated Members.—Messrs. Nugent Grant, Mohamed Ebrahim, C. Venkatachallam Pantulu and T. A. Ramalingam Chettiar.

BOOK REVIEWS.

CIVIL PROCEDURE CODE, by Mr. M. C. Sarkar, 7th edition. 1928. Published by Messrs. Butterworth & Co. Price Rs. 22.

This is the seventh edition of a popular commentary on the Civil Procedure Code. Even when the sixth edition of this work was published it was felt that the work had grown so much in bulk that it might have appeared in two volumes. Nearly three years have elapsed since then and the present edition has been published in two volumes. The learned author has incorporated the decisions since the appearance of the last edition. Although he says in his preface that the cases down to the date of publication have been noted, we do not find any reference to the decision of the Privy Council in *V. P. R. V. Chokkalingam Chetty* v. *Seethai Acha and others* [(1927) I. L. R. 6 R. 29 : 54 M. L. J. 88 (P. C.).] which appeared in the January part of the Rangoon Series and which relates to the power of the appellate court to add parties in appeal or the decision of the Calcutta High Court in *Surendra Kumar Roy Chowdhury* v. *Sushil Kumar Roy Chowdhury* [(1927) I.L.R. 55 C. 249] on the power of a Court to appoint a receiver pending reference to arbitration through Court which appeared in the March part of the Calcutta Series. It is possible that these cases appeared after the present edition went through the press and could therefore not be included. A new feature of the present edition is that the High Courts Act of 1861, the Government of India Act of 1915, the Letters Patent of the various High Courts and the Rules made from time to time by the Chartered High Courts have been incorporated in this edition in the form of appendices. Going through the appendices, we find that the amendment of clause 15 of the Letters Patent of the Calcutta, Madras and Bombay High Courts, requiring the certificate of Court as to fitness in the cases of some classes of Letters Patent appeals has not been incorporated, although the amendment came into force as early as the 14th

January, 1928. The decisions under the Civil Procedure Code and the Rules framed under the Code are growing to such an extent that to cope with them almost annual editions of the Code with commentaries would seem to be called for. We have no doubt that the useful additions to this edition will be appreciated and that it will enjoy a greater measure of popularity.

THE LAW OF INCOME-TAX IN INDIA, by V. S. Sundaram, 2nd edition, 1928. Published by Messrs. Butterworth & Co. Price Rs. 15.

We had occasion to review the first edition of this work and we gave expression to the very high estimate we formed of its utility and value in 53 M. L. J. 27 and we expressed the opinion that it will long remain the leading treatise on the Indian Income-tax Law. The necessity of having to bring out a second edition in about a year after the publication of the first shows that we were justified in having formed such a high opinion of the work. It is a matter for great satisfaction that the author has in the midst of his pressing official duties found time to revise and bring up to date his work on the Law of Income-tax in British India.

PROBATE PROCEDURE IN BRITISH INDIA, by Mr. H. D. Cornish, B.A., Bar.-at-Law, Administrator-General of Madras. Published by Messrs. Higginbothams, Madras, 1928. Price Rs. 10.

We welcome the publication on Probate Procedure in British India from the pen of one who is most competent to write on the subject on account of his intimate acquaintance with Probate practice in his official career. The distinctive feature of the writings of the learned author has been his lucidity of the statement of the law. As this branch of the law is largely based upon the English Testamentary practice, the decisions of the English Courts have been freely referred to. The treatment of the subject is not by way of commentary to any enactment but is in the logical order of the topics dealt with, such as the testator, the will, the executor, the administrator, the petition for Probate, the Probate jurisdiction and the grant of Probate. The six appendices give the testamentary rules of Calcutta, Madras, Bombay, Rangoon, Allahabad and Patna. We have no doubt that the book will be found very useful by those having to deal with the subject.

THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, by K. V. Srinivasa Aiyar, Advocate, Madras and K. V. Sundaresa Aiyar, Pleader, Madura. Price Rs. 3.

This is a commentary on the Madras Hindu Religious Endowments Act of 1927 as amended by Act I of 1928. The Madras Hindu Religious Endowments Board is fast developing into a tribunal having to decide questions on the construction of the Act and under the general law of Trusts, and the assistance of lawyers is frequently invoked for arguments before the Board. It is therefore necessary to have a commentary setting out the scope of the sections of the Act and the decisions of Courts on analogous points of law. The authors have therefore done well in having brought out this publication which will be useful to the various classes of persons having to deal with the enactment. The authors have, it must be noticed, given references not merely to the decisions of the superior courts but also to the rulings of the Hindu Religious Endowments Board itself. It may perhaps be more advantageous to have given some of the leading decisions of the Board *in extenso,* in cases where the authors considered them to be of value, as such decisions are not otherwise easily available to the public. The appendices, which are seven in number, give the analogous provisions of other enactments, the rules framed by the Local Government and the bye-laws framed by the Hindu Religious Endowments Board and other useful information. We would suggest that the authors should in the succeeding editions of their work give not merely references to only one unauthorised report of the decisions which have appeared in other reports as well, but give references to all the reports in which the decisions have appeared and thus enhance the utility of the publication.

We are glad to acknowledge the receipt of the Text of the Indian Bar Councils Act (XXXVIII of 1926) as amended up to date with the rules made by the Madras High Court, published by the Madras Weekly Notes Office.